allows them to combine them to provide a telecommunications service.[736]

230. In the *Ameritech Michigan Order*, the Commission emphasized that the ability of requesting carriers to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications markets.[737] Using combinations of unbundled network elements provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market.[738] Moreover, combining the incumbent's unbundled network elements with their own facilities encourages facilities-based competition and allows competing providers to provide a wide array of competitive choices. Because the use of combinations of unbundled network elements is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirements of section 271, we examine section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission's regulations.

b. Discussion

231. Based on the evidence in the record, we conclude that Bell Atlantic demonstrates that it provides to competitors combinations of network elements that are already preassembled in their network, as well as nondiscriminatory access to unbundled network elements, in a manner that allows competing carriers to combine those elements themselves.[739] We base our conclusion on evidence of actual commercial usage and the results of KPMG's third party test.[740] We note that the New York Commission concludes that Bell Atlantic has provided nondiscriminatory access to combinations of unbundled network elements.[741]

232. The record indicates that Bell Atlantic, as required by the New York Commission, provides a variety of methods that allow competitive carriers to combine unbundled network

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[736] *Id.*

[737] *Ameritech Michigan Order*, 12 FCC Rcd 20543, 20718-19; *BellSouth South Carolina Order*, 13 FCC Rcd at 646.

[738] *BellSouth South Carolina Order*, 13 FCC Rcd at 646; *see also Local Competition First Report and Order*, 11 FCC Rcd at 15666-68.

[739] *See* Lacouture/Troy Decl. at paras. 117-25. Pursuant to NY P.S.C. 914 Tariff, Bell Atlantic offers standard physical and virtual collocation arrangements as well as a variety of alternative collocation arrangements that competing carriers can use to combine individual network elements. Pursuant to NY P.S.C. 916 Tariff, Bell Atlantic provides access to preassembled combinations of network elements.

[740] Through August 1999, Bell Atlantic had provided over 152,000 network element platforms in service. Bell Atlantic Lacouture/Troy Decl. at para. 122. KPMG has verified that Bell Atlantic can process more than 570,130 platform orders a year. *Id.* (citing KPMG Final report at Appendix C (App. C, Tab 916)).

[741] *See* Bell Atlantic Lacouture/Troy Decl. at para. 115 (stating that "the New York Public Service Commission has agreed that [Bell Atlantic] is providing [competing carriers] with 'every technically feasible method available today for competitive LECs to access network elements combinations to provide service.").

elements with their own facilities. For example, in addition to the standard physical and virtual collocation arrangements, Bell Atlantic provides alternative collocation arrangements such as smaller physical collocation cages, shared collocation cages, and cageless collocation arrangements.[742] The record also indicates that Bell Atlantic has provided eleven "Assembly Room" and "Assembly Point" arrangements which do not require conditioned space and take less time to implement than caged collocation arrangements.[743]

233. The record also indicates that Bell Atlantic, as required by the New York Commission, provides access to preassembled combinations of network elements. For example, Bell Atlantic has provided to competitors more than 152,000 preassembled platforms of network elements, including the loop switch combination (UNE-P) out of certain central offices, as well as local switching elements in combination with other shared elements, such as shared transport, shared tandem switching, operator services, directory assistance, and SS7 signaling.[744] In addition, Bell Atlantic provides Enhanced Extended Loops (EELs), a combination of loops and transport.[745] All of these combinations are offered in accordance with the New York Commission's requirements.[746]

234. We disagree with arguments that Bell Atlantic's collocation offerings are deficient.[747] ALTS and several other carriers argue that BA's collocation arrangements involve delays that diminish the ability of the competitive LECs to provide the services they seek to offer.[748] As discussed above, we conclude that Bell Atlantic's collocation offerings meet the Act's nondiscrimination requirements.[749]

235. We are not persuaded by arguments that the restrictions Bell Atlantic places on the use of its loop-switch (UNE-P) and loop-transport (EEL) offerings warrant a finding of checklist noncompliance. Several parties argue that Bell Atlantic cannot limit the central offices from which the UNE-P is offered.[750] They also assert that the sunset provision that allows Bell

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742 Bell Atlantic Lacouture/Troy Decl. at para. 118; NY P.S.C. 914 Tariff.

743 Bell Atlantic Application at 26; Lacouture/Troy Decl. at para. 118 (citing NY P.S.C. 914 Tariff). Bell Atlantic's Assembly Rooms are rooms within Bell Atlantic's central offices where competitive carriers can combine loops and switching ports, and Assembly Points are cabinets adjacent to Bell Atlantic's central offices where competitive carriers can combine loops and switching ports. *Id.*

744 Bell Atlantic Application at 24; Lacouture/Troy Decl. at paras. 122-24.

745 *Id.* at 125.

746 *Id.* at paras. 115, 122, 125.

747 TRA Comments at 21; ALTS Comments at 11.

748 *See, e.g.*, ALTS Comments at 49-64; DSL.net Comments. at 7-8.

749 *See* discussion of checklist item 1 above.

750 *See, e.g.*, Sprint Comments at 16-17; TRA Comments at 19; AT&T Comments at 49-50; AT&T Reply at 44; CompTel Dec. 10 *Ex Parte* Letter. Bell Atlantic does not provide the full loop-switch platform for business services in New York City wire center in which there are two or more competing carriers already collocated and

Atlantic's UNE-P offering to sunset 4-6 years is unlawful.[751] With regard to Bell Atlantic's EEL offerings, several parties contend that Bell Atlantic also unlawfully restricts the availability of extended loops by refusing to allow competing LECs to use them to provide solely exchange access service.[752]

236. In the wake of the Supreme Court's January 25, 1999 decision vacating the Commission's Rule 51.319 that identified the network elements incumbent LECs are required to provide on an unbundled basis, and prior to adoption of our order reinstating that rule, the incumbents' obligations with regard to offering unbundled network elements or combinations thereof has been unclear.[753] Given this vacuum, we find it would be inequitable to penalize Bell Atlantic for complying with the rules established by the New York Commission. Although we have adopted new rules identifying the incumbent LECs' unbundling obligations,[754] these rules are not in effect yet. Moreover, even under our new rules, the extent to which requesting carriers may place restrictions on their loop-transport combinations remains the subject of a further notice.[755] We therefore find that the restrictions Bell Atlantic places on its loop-transport combinations and its UNE-P combinations do not warrant a finding of checklist noncompliance.

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tariffed to provide local service. *See Pre-Filing Statement of Bell Atlantic New York* at 9, Case 97-C-0271 (PSC filed Apr. 6, 1998).

751 Bell Atlantic's residence and business platform offerings have duration periods of either 4 or 6 years, depending on whether the central office is located in Zone 1 or Zone 2. *See Pre-Filing Statement of Bell Atlantic New York* at 9-10, Case 97-C-0271 (PSC filed Apr. 6, 1998).

752 *See, e.g.*, AT&T Comments at 50-51; TRA Comments at 19-20; RCN Comments at 6-8.

753 The Supreme Court also reinstated the Commission's Rule 51.315 (b) (prohibiting incumbents from separating preassembled combinations of network elements) which, along with rules 51315(c)-(f) (requiring incumbents' to combine non-preassembled combinations of elements for requesting carriers), had been overturned by the Eighth Circuit. *AT&T Corp v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999).

753 In light of the reasoning set forth in that decision, the Commission has asked the Eighth Circuit to reinstate rules 51.315(c)-(f). That matter is still pending.

754 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth FNPRM*).

755 In the *Fourth FNPRM*, we stated that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements. We concluded, however, that under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices. *Third Report and Order and Fourth FNPRM* at para. 484. In a *Supplemental Order*, we modified those conclusions with respect to the use of unbundled network elements to provide exchange access services. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98 (adopted Nov. 24, 1999) (*Supplemental Order*). Specifically, we stated that in order to preserve the issue in the *Fourth FNPRM* as we intended, we would "allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements of [*the Supplemental Order*"]. *Id.* at para 2. We also concluded that this constraint does not apply if an interexchange carrier uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. *Id.* at para. 5.

Once our new rules identifying the unbundling obligations of network elements become effective, Bell Atlantic must fully comply with those rules.[756]

3. Pricing of Network Elements

a. Background

237. Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.[757] Section 251(c)(3) requires local incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . . ."[758] Pursuant to section 252(d)(1), determinations by a state commission of just and reasonable rates for network elements shall be "based on the cost . . . of providing . . . the network element . . . and nondiscriminatory [ ] and may include a reasonable profit."[759] Based on this statutory mandate, the Commission has determined that prices for interconnection and unbundled network elements (or UNEs) must be based on an incumbent LEC's forward-looking, long-run incremental costs for each network element.[760] It adopted a pricing methodology that encompasses these concepts called TELRIC, or Total Element Long Run Incremental Cost.[761] In order to prove compliance with these statutory provisions, a BOC must show that its prices for interconnection and unbundled network elements are based on forward-looking, long-run incremental costs.

b. Discussion

238. Based on the evidence in the record, we conclude that Bell Atlantic demonstrates that its pricing of unbundled network elements complies with the requirements of checklist item 2.[762] We agree with Bell Atlantic's assertion that it has worked with the New York Commission to establish prices for unbundled network elements and that these proceedings "have resulted in a

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[756] We note that Bell Atlantic states that it will comply with the Commission's unbundling rules once they become effective. Bell Atlantic Application at 25.

[757] 47 U.S.C. § 271(B)(ii).

[758] 47 U.S.C. § 251(c)(3).

[759] 47 U.S.C. § 252(d)(1).

[760] *Local Competition First Report and Order*, 11 FCC Rcd at 15845.

[761] *Id.* at 15844-46.

[762] *See* Bell Atlantic Application at 66; *NYPSC Collocation Order* at 7; *NYPSC Interconnection Tariff* at 5.1.17(A)(B) and 10.5.1(A)(B); NYPSC Tariff No. 916 (Bell Atlantic Application App. H, Tab 3) *(NYPSC UNE Tariff)* at 5.12.9.5; *Opinion and Order Concerning Methods for Network Element Recombination*, Case Nos. 98-C-0690 and 95-C-0657 (NYPSC Nov. 23, 1998 (Bell Atlantic Application App. D, Vol. 6, Tab 121) *(NYPSC UNE Recombination Order); Opinion and Order Setting Rates for First Group of Network Elements*, Case Nos. 95-C-0657, 94-C-0095, 91-C-1174 (NYPSC April 1, 1997) (Bell Atlantc Application App. G, Vol. 1, Tab 9) *(NYPSC Phase I Order)*; New York Commission Comments at 152-62; New York Commission Reply at 49-50.

full suite of TELRIC rates."[763] Specifically, as discussed below, we agree with the New York Commission that Bell Atlantic's prices for switches and loops offered as unbundled network elements are priced pursuant to a forward-looking, long-run incremental cost methodology. The New York Commission further asserts that "prices conforming to the FCC's requirements are in effect for resale, interconnection, and unbundled network elements provided by Bell Atlantic-NY."[764] The Department of Justice did not comment on Bell Atlantic's prices for unbundled network elements. We stress that we place great weight on the New York Commission's active review and modification of Bell Atlantic's proposed unbundled network element prices, its commitment to TELRIC-based rates, and its detailed supporting comments concerning its extensive, multi-phased network elements rate case, as discussed below.

239. Despite the fact that the Eighth Circuit stayed the Commission's pricing authority after the New York Commission had begun its network elements rate case, the New York Commission determined that it would proceed in the rate case on a TELRIC basis.[765] In Phase One of its rate case, the New York Commission considered two different TELRIC-based cost models, one submitted by Bell Atlantic and another, the Hatfield model, submitted by AT&T and MCI.[766] The New York Commission noted that Bell Atlantic objected to TELRIC "in principle"[767] but that "the parties continued to rely on the TELRIC standard."[768] The New York Commission held that it "need not evaluate the various costing methods on theoretical grounds" because

> The case was litigated on a TELRIC basis; all parties contemplate its being decided on that basis; TELRIC is certainly a reasonable approach to use, though just as certainly not the only one; and, as [Bell Atlantic][769] recognizes, as a practical matter there is no alternative other than the very unattractive one of temporary rates while a lengthy new case is litigated.[770]

240. The New York Commission considered each of the cost elements to Bell Atlantic's TELRIC-based cost model. It approved, without modification, some of Bell Atlantic's proposed cost inputs, but substituted what it deemed "more reasonable inputs" to both Bell Atlantic's cost model and the Hatfield model.[771] The New York Commission noted that, when it compared the

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763 Bell Atlantic Application at 65-66.

764 New York Commission Comments at 162; *see also* New York Commission Reply at 42.

765 *NYPSC Phase I Order* at 4.

766 *Id.* at 14.

767 *Id.*

768 *Id.* at 13.

769 In the New York Commission rate case, Bell Atlantic filed under the name of "New York Telephone d/b/a/ Bell Atlantic-New York." *See, e.g., NYPSC Phase 3 Order* at 1.

770 *NYPSC Phase 1 Order* at 14.

771 *Id.* at 48-64.

modified results from the two cost models, the resulting costs converged and sometimes even crossed each other which, the New York Commission determined, defined a "sharply narrowed range of reasonable results that may be reached on the record here."[772] The New York Commission determined that each cost model had its own advantages and disadvantages, and held that "in the absence of factors clearly tending one way or the other, prices will be set at the mid-point of that narrowed range."[773]

241. *Burden of Proof.* We reject AT&T's assertion that Bell Atlantic has not provided sufficient detail in its section 271 application to demonstrate that its prices for unbundled network elements comply with the Act.[774] In its section 271 application, Bell Atlantic asserts that the outcome of the New York Commission rate proceedings on network elements resulted in rates "fully consistent with this Commission's pricing rules, including the TELRIC methodology."[775] While Bell Atlantic did not discuss in detail its pricing methodology in its section 271 application, it did provide sufficient documentation in its supporting affidavits and attachments for us to evaluate the pricing of each network element.[776] Additionally, Bell Atlantic provided extensive records of the New York Commission's network elements rate case.

242. *Switch Prices.* We conclude that Bell Atlantic provides sufficient evidence to demonstrate that its switch costs are based on forward-looking, long-run incremental costs.[777] We reject AT&T's allegation that Bell Atlantic's switching prices violate TELRIC principles because they fail to account for any cost savings from the steep switch discounts that an efficient carrier operating in the long run would unquestionably receive.[778] AT&T previously raised this issue with the New York Commission, which considered AT&T's assertion and made significant modifications to Bell Atlantic's proposed switch prices. Using its TELRIC-based model, Bell Atlantic calculated an average total installed switch investment of $586 per line.[779] This switch cost was significantly higher than those calculated by AT&T under the Hatfield model, which calculated a per-line switch investment of $125.[780] The New York Commission held that the wide

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772 *Id.* at 99.

773 *Id.* at 120. We note that Phase Four of the New York Commission's network elements rate case has not been completed, and several important network element issues remain outstanding. New York Commission Comments at 154-55.

774 AT&T Comments at 54.

775 Bell Atlantic Application at 66.

776 *See, e.g., NYPSC Phase I Order*; *NYPSC Phase 3 Order*; Bell Atlantic Pre-Filing Statement; Bell Atlantic-New York Joint Affidavit in Support of Proposed Rates for ADSL-Qualified, HDSL-Qualified, and Digital-Designed Links, Case 98-C-1357 (NYPSC Sept. 13, 1999) (Rhythms Comments, Attach. EHG-RW-3) (Bell Atlantic Affidavit in Support of DSL Links); *NYPSC Collocation Order.*

777 *NYPSC Phase I Order* at 84.

778 AT&T Comments at 60.

779 *NYPSC Phase I Order* at 83-84.

780 *Id.* at 83-84.

disparity between the two TELRIC models' inputs called both figures into question, and that the record before it suggested that neither figure was reliable.[781] The New York Commission then conducted its own examination into switching costs, after which it estimated a per-line switch cost of $303, which it reduced to $192 to account for declining switch prices within the industry.[782] The New York Commission contends that the resultant switch prices are TELRIC-based.[783] Based on the evidence in the record, we find that the New York Commission has already considered AT&T's allegation that Bell Atlantic's proposed switch costs were too high and responded appropriately. Bell Atlantic may only recover $192 per switch per line, a significant reduction from its original proposal of $586 per line and an amount much closer to AT&T's estimation. We have no basis to disagree with the New York Commission that its calculation of switching costs is a "reasonable calculation of pertinent costs, arrived at by the New York Commission Staff's application of forward-looking TELRIC analysis."[784]

243. We also disagree with AT&T's further assertions that: (1) the Commission has concluded in the context of the Universal Service Fund that TELRIC does not permit recovery of the cost of "augmented switches," which are existing switches with capacity upgrades, and Bell Atlantic's proposal to recover such costs here violates TELRIC;[785] (2) the New York Commission admitted in its reply comments that it did not apply a TELRIC methodology to switch prices and set switch prices based on speculative claims, not facts;[786] and (3) Bell Atlantic's switch rates are merely interim in nature, pending a new pricing rulemaking.[787]

244. First, we note that in the *Local Competition First Report and Order*, the Commission held that, while TELRIC consists of "methodological principles" for setting prices,[788] states retain flexibility to consider "local technological, environmental, regulatory, and economic conditions."[789] In reviewing state pricing decisions in the context of section 271 applications, we will not reject an application because isolated factual findings by a commission might be different from what we might have found if we were arbitrating the matter under section 252(e)(5). Rather, we will reject the application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls

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781 *Id.* at 84.

782 Id. at 84-85; see also Order Denying Motion to Reopen Phase I and Instituting New Proceeding (NYPSC Sept. 30, 1998) (Bell Atlantic Application App. G, Vol. 1, Tab 18) (NYPSC Order Denying Motion to Reopen Phase I).

783 New York Commission Reply at 47-48.

784 *Id.* at 48.

785 AT&T Comments at 60.

786 Letter from Mark C. Rosenblum, Vice President-Law, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Nov. 23, 1999) *(AT&T Nov. 23 Ex Parte* Letter) at 6.

787 AT&T Comments at 62-63.

788 *Local Competition First Report and Order*, 11 FCC Rcd at 15812.

789 *Id.* at 15559.

outside the range that the reasonable application of TELRIC principles would produce.

245. Here, in response to AT&T's allegations regarding switch discounts, the New York Commission asserts that it "appropriately exercised its power to take account of conditions in New York" when it determined switching costs pursuant to TELRIC.[790] We agree with New York that it has appropriately exercised its flexibility to set prices within a range of TELRIC-based rates. We also agree with the New York Commission that its determination of allowable switch costs was the result of a complex analysis that does not lend itself to simple arithmetic correction through the adjustment of a single input.[791] AT&T has presented no evidence to persuade us that New York did not conform to TELRIC principles simply because it failed to modify one input into its cost model. We are not persuaded by AT&T's assertion that in our Universal Service proceeding, we disallowed the cost recovery of "augmented switches," and that Bell Atlantic's recovery includes such cost recovery, which violates our rules.[792] As we stated in the *Universal Service Tenth Report and Order*, that federal cost model "was developed for the purpose of determining federal universal service support, and it may not be appropriate to use nationwide values for other purposes, such as determining prices for unbundled network elements."[793] We specifically cautioned parties from making any claims in any other proceedings based on the inputs adopted in the *Universal Service Tenth Report and Order*.[794]

246. Second, contrary to AT&T's assertion, we see no admission in the record by the New York Commission that it did not use a TELRIC-based cost methodology for switch prices. We find no basis to disagree with the New York Commission's assertion that it calculated pertinent costs "arrived at by the NYPSC Staff's application of forward-looking TELRIC analysis."[795] Moreover, we are not persuaded that Bell Atlantic's switching costs are based on speculation, simply because AT&T believes the New York Commission did not adequately reflect switching discounts. As discussed above, the New York Commission engaged in extensive fact-finding in its rate case, and specifically considered AT&T's assertions about switching discounts. As a result, Bell Atlantic's switching prices were greatly reduced, with a final result that is very close to AT&T's estimated switching prices, further undermining AT&T's claims that Bell Atlantic's switch prices are double or even triple what they should be.[796]

247. Third, we see no reason to disagree with the New York Commission that Bell Atlantic's switch costs are not "interim" merely because they may be adjusted in the future to

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790 New York Commission Reply at 46.

791 *See id.* at 48.

792 *See* AT&T Comments at 60.

793 *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Tenth Report and Order, FCC 99-304 (rel. Nov. 2, 1999) (*Universal Service Tenth Report and Order*) at para. 32.

794 *Id.*

795 New York Commission Reply at 48.

796 AT&T Comments at 61; *see also* AT&T Nov. 23 *Ex Parte* Letter at 4-5.

account for newly adduced evidence.[797] The New York Commission held that, while it had initially been persuaded by Bell Atlantic that it did not receive large switch discounts from its vendors, AT&T later presented new evidence on such discounts, which the New York Commission will examine in its second network elements rate case.[798] AT&T has presented no evidence that the New York Commission's "ongoing examination of the [switch discount] issue betokens a failure to set TELRIC-compliant rates," nor does it refute the New York Commission's claim that these rates may be refined in the future, "but they are no less TELRIC-compliant on that account."[799]

248. *Loops - Copper Feeder.* We also reject AT&T's allegation[800] that Bell Atlantic's unbundled element prices are not TELRIC-based because Bell Atlantic uses fiber in the feeder portion of its loop plant, which can be more expensive than copper in longer loop lengths.[801] AT&T raised identical arguments before the New York Commission.[802] There, AT&T asserted that copper feeder is cheaper than fiber for loops shorter than 9,000–12,000 feet, and that Bell Atlantic should not be allowed to recover the higher capital costs of fiber feeder.[803] AT&T also asserted that Bell Atlantic installed all-fiber feeder in order to subsidize its own broadband network for the provision of future services, and that competitors should not be required to subsidize such costs.[804] AT&T also asserts that loops that may be efficient for shorter loop lengths such as those in Manhattan may not be efficient in other parts of New York state.[805] In response, the New York Commission notes that it analyzed the difference between fiber and copper feeder, but found that the higher cost of fiber feeder was "more than offset" by the lower provisioning and maintenance costs of fiber.[806] Additionally, the New York Commission was not persuaded by assertions that Bell Atlantic had inflated its loop costs in order to subsidize its own broadband ventures.[807] The New York Commission found that the economics of copper versus fiber depend "not only on loop length but on capacity."[808] The New York Commission held that

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797 New York Commission Reply at 47-48.

798 *NYPSC Phase I Order* at 85, n.1; see also New York Commission Reply at 47-48; *NYPSC Order Denying Motion to Reopen Phase I.*

799 New York Commission Reply at 47.

800 AT&T Comments at 58-60.

801 New York Commission Reply at 45-46.

802 *NYPSC Phase I Order* at 70.

803 *Id.*

804 *Id.*

805 AT&T Nov. 23 *Ex Parte* Letter at 4-5.

806 *NYPSC Phase I Order* at 83-84.

807 *Id.*

808 New York Commission Reply at 45-46.

New York's population per square mile supports "the economies afforded by fiber's greater capacity . . . even where distances are short."[809] AT&T also alleges that Bell Atlantic's prices for unbundled loops include the costs of terminating DLC circuits at the switch using antiquated terminations rather than the modern GR-303 technology used for the loop feeder.[810] AT&T contends that Bell Atlantic's use of older DLC terminations does not reflect an efficient, forward-looking network and thus violates TELRIC principles.[811] AT&T again raised an identical argument before the New York Commission.[812] The New York Commission found no evidence to support AT&T's allegations regarding either fiber feeder or DLC terminations.[813] The New York Commission also noted that, in the future, competitors may wish to purchase elements to provide enhanced services to their own customers, and that fiber may prove useful for these purposes.[814] AT&T also asserts that the New York Commission improperly relied on a 1991 Bell Atlantic cost study that was never placed into the record of the New York Commission's rate case when it considered the costs of fiber feeder.[815] The New York Commission responds that its reliance on the 1991 cost study was both limited and proper.[816]

249. We find that AT&T has not presented sufficient evidence to prove that the New York Commission erred in its determination or that it neglected to consider any relevant facts relating to fiber feeder or DLC termination technology. We have no reason to disagree with the New York Commission's conclusion that Bell Atlantic's use of fiber and DLC termination technology in this case does not make its rates inconsistent with a TELRIC methodology.[817]

250. *Conditioning of xDSL-Capable Loops.* We find that Bell Atlantic's interim rates for xDSL provisioning and conditioning, which are subject to refund or true-up when the New York Commission completes its xDSL cost study, are not a basis for rejecting the section 271 application. DSL describes a "family of transmission technologies that use specialized electronics at the customer's premises and at a telephone company's central office . . . to transmit high-speed data signals over copper cables."[818] Bell Atlantic offers unbundled loops for use by competing carriers to provide Asymmetrical Digital Subscriber Line (ADSL) and High Bit-Rate Digital

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809 *Id.* at 46 and n.4.

810 AT&T Clarke/Petzinger Aff. at paras. 5-24.

811 Id. at paras. 5-24; see also AT&T Nov. 23 *Ex Parte* Letter at 4.

812 NYPSC Phase I Order at 71-72.

813 *Id.* at 83-84.

814 *Id.*

815 AT&T Nov. 23 *Ex Parte* Letter at 5.

816 New York Commission Reply at 46 n.2.

817 We note, however, that in other states it may be acceptable, and even preferable, to assume the use of copper in certain parts of a LEC's network.

818 *Bell Atlantic Affidavit in Support of DSL Links* at 4. A small "x" before the letters "DSL" signifies the use of the term as a generic transmission technology. *See infra* Section V.D.

Subscriber Line (HDSL).[819] Bell Atlantic offers "ADSL-qualified links" to loops of less than 18,000 feet, and "HDSL-qualified links" to loops of less than 12,000 feet.[820] Bell Atlantic asserts, however, that "certain technical difficulties arise when ADSL or HDSL signals are transmitted over loops that exceed a certain length."[821] Bell Atlantic asserts that, if a competitive carrier desires ADSL- or HDSL-level transmission over loops exceeding these lengths, loop "conditioning" may be required.[822] Bell Atlantic's tariff regarding these services also includes a variety of "ancillary" charges, all but one of which are non-recurring charges.[823]

251. Bell Atlantic's ancillary charges generally fall into one of two categories: 1) charges related to loop qualification, or 2) charges related to conditioning unqualified loops.[824] In the first category of ancillary charges, Bell Atlantic operates a loop qualification database, which competitors must access to find necessary information about the loop they wish to use.[825] Bell Atlantic imposes a "Mechanized Loop Qualification Charge" to recover the costs associated with the creation and maintenance of this database.[826] If a loop is not included in the loop database, or if a competitive provider requires additional information about a loop, a manual loop qualification occurs, and additional charges may accrue.[827]

252. In the second category of ancillary charges, Bell Atlantic charges competing carriers to remove load coils[828] and bridge taps[829] from its ADSL- and HDSL-qualified loops. Bell Atlantic asserts that load coils make loops generally unsuitable for xDSL transmission.[830] Therefore, it charges these carriers to remove these load coils, as well as some bridge taps. Bell

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819 Bell Atlantic-New York's Joint Affidavit in Support of Proposed Rates for ADSL-Qualified, HDSL-Qualified, and Digital-Designed Links, Case 98-C-1357 (Sept. 13, 1999) at 4-5.

820 *Id.* at 6.

821 *Id.* at 6.

822 *Id.*

823 *Id.*

824 *Id.* at 8.

825 *Id.* at 8-9.

826 *Id.* at 6. Bell Atlantic states that it would be willing to recover these charges through a non-recurring, loop based charge. *Id.*

827 *Id.* at 9-10. In addition to a manual loop qualification charge, Bell Atlantic may impose an engineering query charge, an engineering work order charge, and a pair swap charge. *Id.* at 10-13.

828 A load coil is an inductor that is connected into a loop in order to improve its voice transmission characteristics. *Id.* at 14.

829 Bridge taps are a branching of a copper loop that permit the appearance of the loop at a number of alternative servicing terminal locations, which give the telephone company greater flexibility in reassigning a telephone number to a different address without rearranging existing facilities. *Id.* at 14-16.

830 *Id.* at 14.

Atlantic asserts that, because the number of load coils on a loop depends on its length, its charge to remove load coils on loops longer than 18,000 feet is loop-length-sensitive.[831] Bell Atlantic does not charge for the removal of load coils on loops of less than 18,000 feet.[832] On loops of less than 18,000 feet, Bell Atlantic will not charge to remove bridge taps between 12,000 and 18,000 feet in order to accommodate xDSL technology. Bell Atlantic will remove these shorter bridge taps on its shorter loops, but will charge competing providers for this service.[833]

253. Bell Atlantic asserts that its proposed rates for these ancillary services are "equal to their costs"[834] and are forward-looking because they reflect the most efficient technology currently available for the services requested.[835] Bell Atlantic also asserts that the charges for these ancillary services, most of which are non-recurring charges, are essentially determined as the product of an estimated worktime and a relevant labor rate.[836]

254. In the *Local Competition First Report and Order*, the Commission found that, in some instances, incumbent LECs would be required to "take affirmative steps to condition existing loop facilities" to enable competitors to provide services not currently provided over the facilities, such as xDSL.[837] The Commission stated that "such loop conditioning may involve removing load coils or bridge taps that interfere with the transmission of digital signals,"[838] and that the carrier requesting the loop conditioning would be required to "bear the cost of compensating the incumbent LECs for such conditioning."[839] Pursuant to Commission rules, "nonrecurring charges . . . shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element."[840] The costs incumbents impose on competitors for line conditioning, which are nonrecurring charges, must be in compliance with these pricing rules.

255. A number of carriers assert that Bell Atlantic does not demonstrate that its

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831 *Id.* at 16. Additional charges may accrue when a competitive provider orders a two-wire digital link that is longer than 18,000 feet. *Id.*

832 *NYPSC UNE Tariff* at 5.5.1.1(D)(2)(b).

833 *Id.*

834 Bell Atlantic-New York's Joint Affidavit in Support of Proposed Rates for ADSL-Qualified, HDSL-Qualified, and Digital-Designed Links, Case 98-C-1357 (Sept. 13, 1999) at 16.

835 *Id.*

836 *Id.* at 17.

837 *Local Competition First Report and Order*, 11 FCC Rcd at 15692.

838 *Id.*

839 *Id.*

840 47 C.F.R. § 51.509(e).

proposed prices for its xDSL-capable loops comport with TELRIC.[841] These carriers assert that Bell Atlantic's xDSL loop provisioning policies are discriminatory, unjust, and unreasonable because they fail to give an efficient competitor a meaningful opportunity to compete.[842] ALTS contends that Bell Atlantic's charge for loop qualification fails to comply with the TELRIC standard.[843]

256. Bell Atlantic urges us to refrain from evaluating Bell Atlantic's xDSL charges because its xDSL rates, which are interim and subject to refund, are still being reviewed by the New York Commission, and "there is no warrant for additional review here."[844] In its evaluation of Bell Atlantic's section 271 application, the New York Commission notes that it is currently considering the issue of permanent rates pertaining to recurring and nonrecurring charges related to xDSL-capable loops, including conditioning and database charges.[845] Noting that commenters have asserted that such charges may be so high that they are prohibitive, the New York Commission stated that a separate, accelerated track is underway to address these issues in its network element rate proceeding.[846] Additionally, the New York Commission asserts that, in the interim, both recurring and non-recurring xDSL charges proposed by Bell Atlantic are temporary and subject to refund or true-up.[847] In its reply brief, the New York Commission states that, consistent with its commitment to TELRIC principles and "to setting prices that satisfy the requirements of the 1996 Act and the Commission, we can safely say that [xDSL] rates meeting those requirements will have been set before the end of the year."[848] Bell Atlantic contends that any concerns regarding its xDSL rates "will be resolved by the New York Public Service Commission in accordance with TELRIC standards in less than two months."[849]

257. We note that Bell Atlantic currently has interim rates in effect for its conditioning of xDSL-capable loops, pending completion by the New York Commission of its xDSL rate

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841 ALTS Comments at 36-37; CoreComm Comments at 6; Covad Comments at 6; Intermedia Comments at 8; MCI WorldCom Comments at 21.

841 ALTS Comments at 36-37.

842 ALTS Comments at 36-37; CoreComm Comments at 6; Covad Comments at 6; Intermedia Comments at 8; MCI WorldCom Comments at 21.

842 ALTS Comments at 36-37.

843 *Id.* at 36.

844 Bell Atlantic Reply at 53-55.

845 New York Commission Comments at 79-80.

846 *Id.*

847 *Id.*

848 New York Commission Reply at 49.

849 Bell Atlantic Lacouture/Troy Reply Decl. at para. 195.

case.[850] The Commission has not previously addressed the question of whether a section 271 applicant's reliance on interim rates should constitute grounds for rejection.

258. Although we recognize that interim rates create uncertainty, we are also aware that establishing permanent recurring and nonrecurring rates relating to unbundled network elements, resale, and transport and termination offerings is a complex and ongoing process. It was for that reason in the *Local Competition First Report and Order* that the Commission proposed interim proxy rates that states could use until they completed their permanent cost proceedings.[851] We conclude that a BOC's application for in-region interLATA authority should not be rejected solely because permanent rates may not yet have been established for each and every element or nonrecurring cost of provisioning an element. We believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff. Uncertainty will be minimized if the interim rates are for a few isolated ancillary items, permanent rates that have been established are in compliance with our rules, and the state has made reasonable efforts to set interim rates in accordance with the Act and the Commission's rules.

259. We accept Bell Atlantic's proposal that we allow its interim rates until the New York Commission reviews its cost support and, if necessary, adjusts its rates to conform to a TELRIC-based cost methodology. The conditioning of xDSL loops is a relatively new issue, and because new issues are constantly arising, we believe that it is reasonable to allow a limited use of interim rates when reviewing a section 271 application where the state has not yet completed its permanent rate case for a new service. Additionally, the New York Commission, as discussed above, has a substantial track record of setting other applicable prices at TELRIC rates.[852] Bell Atlantic's interim rates are subject to refund or true-up if the New York Commission determines that they exceed applicable TELRIC-based costs.[853] Additionally, the Commission has clearly stated that incumbent LECs, if required to condition loops, may recover their costs of such conditioning.[854] If any of these factors were absent, however, we would not be inclined to approve a section 271 application that contains interim rates because we would lack confidence that the permanent rates would be set in accordance with the Act.

260. Finally, although we would be willing, at this time, to grant a section 271 application with a limited number of interim rates where the confidence-building factors identified

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850 New York Commission Reply at 49.

851 Local Competition First Report and Order, 11 FCC Rcd at 15812.

852 We note that the New York Commission has committed to review Bell Atlantic's cost studies in support of its DSL prices and to conform such prices to TELRIC before the end of 1999. New York Commission Reply at 49-50.

853 We note that New York Commission is taking reasonable steps to complete its permanent rate-setting proceeding within a short time-frame, and the New York Commission and Bell Atlantic have both committed to the use of forward-looking economic costs for determining unbundled network elements rates. *NYPSC Collocation Order* at 7; Bell Atlantic Reply at 55.

854 *Local Competition First Report and Order*, 11 FCC Rcd at 15692.

above are present, we emphasize that it is clearly preferable to analyze a section 271 application on the basis of rates derived from a permanent rate proceeding. At some point, states will have had sufficient time to complete these proceedings. We will, therefore, become more reluctant to continue approving section 271 applications containing interim rates. It would not be sound policy for interim rates to become a substitute for completing these significant proceedings.

261. In the instant case, Bell Atlantic is only charging for removal of load coils and bridge taps that impede xDSL service but are otherwise appropriate for providing voice-grade service. In these circumstances, the cost of removing load coils and bridge taps can only be done on a loop-by-loop basis and may be expensive. We are not in a position to judge whether Bell Atlantic's interim rates are too high until the New York Commission has completed its review. Given the limited scope of Bell Atlantic's interim rates, the refund mechanism and the New York Commission's track record in reviewing Bell Atlantic's rates, we find that Bell Atlantic's interim rates for xDSL-capable loops meet the checklist requirement at this time. We note, however, that any significant time delay in permanent rates could be a basis for finding noncompliance with section 271 requirements.

262. *Glue Charges.* We also reject Cable & Wireless' assertion that Bell Atlantic acts in a discriminatory fashion by imposing an additional "glue charge" on business customers when it sells them unbundled network elements. Cable & Wireless contends that this charge is unlawful and will hinder the development of broad-based local competition.[855] The New York Commission has defined "glue charges" as "charges that competitors will pay Bell Atlantic (in some cases) to compensate it for combining together all of the network elements into the 'platform.'"[856] In its state UNE tariff revision with an effective date of February 15, 1999, Bell Atlantic proposed a "glue charge," which it stated would apply "to each Existing and New UNE Platform used to provide business POTS service."[857] The New York Commission approved this glue charge.[858] In a tariff revision that took effect September 24, 1999, however, Bell Atlantic removed the glue charges.[859] As a general rule, we are skeptical of glue charges, and note with approval that these glue charges were removed from Bell Atlantic's tariff before Bell Atlantic filed its section 271 application. Thus, the issue of glue charges is moot, and we need not further consider it here.

C. Checklist Item 3 – Poles, Ducts, Conduits, and Rights-of-Way

1. Background

263. Section 271(c)(2)(B)(iii) requires BOCs to provide "[n]ondiscriminatory access to

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855 Cable & Wireless Comments at 6.

856 Bell Atlantic Pre-Filing Statement at 1.

857 *NYPSC UNE Tariff* at 5.12.8.5.

858 *Bell Atlantic Pre-Filing Statement*, Attach. Letter from John F. O'Mara, Chairman, New York State Public Service Commission, to Hon. Maureen O. Helmer, Deputy Chairman, New York State Public Service Commission (filed April 6, 1998) at 4.

859 *NYPSC UNE Tariff* at 5.12.9.5.

the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[860] In the *Local Competition First Report and Order*, the Commission interpreted section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of section 224.[861] In addition, we interpreted the revised requirements of section 224 governing rates, terms, and conditions for telecommunications carriers' attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.[862] Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[863] Notwithstanding this requirement, section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[864]

264. Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for "pole attachments."[865] Section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are "just and reasonable."[866] Notwithstanding this general grant of authority, section 224(c)(1) states that "[n]othing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such

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860 47 U.S.C. § 271(c)(2)(B)(iii). As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section 224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits, or rights-of-way owned or controlled by utility companies, including LECs. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20706, n.574.

861 *Local Competition First Report and Order*, 11 FCC Rcd at 16073.

862 Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) (Pole Attachment Telecommunications Rate Order).

863 47 U.S.C. § 224(f)(1). Section 224(a)(1) defines "utility" to include any entity, including a LEC, that controls, "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

864 47 U.S.C. § 224(f)(2). In the *Local Competition First Report and Order*, the Commission concluded that, although the statutory exception enunciated in section 224(f)(2) appears to be limited to utilities providing electrical service, LECs should also be permitted to deny access to their poles, ducts, conduits, and rights-of-way, because of insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes, provided the assessment of such factors is done in a nondiscriminatory manner. *Local Competition First Report and Order*, 11 FCC Rcd at 16080-81.

865 Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

866 47 U.S.C. § 224(b)(1).

matters are regulated by a State." As of 1992, nineteen states, including New York, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.[867]

2. Discussion

265. Based on the evidence in the record, we find that Bell Atlantic demonstrates that it is providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms, and conditions in accordance with the requirements of section 224, and thus satisfies the requirements of checklist item 3.[868] The New York Commission concludes that Bell Atlantic provides nondiscriminatory access to poles, ducts, conduits and rights-of-way in compliance with this checklist item.[869]

266. Although ALTS argues that Bell Atlantic does not provide nondiscriminatory access to conduits, and rights-of-way within multiple tenant environments,[870] Bell Atlantic responds that it does not control the conduits and rights-of-way within the multiple tenant environments cited by ALTS.[871] Section 271(c)(2)(B)(iii) is limited to the requirements set forth in section 224 and thus does not require the incumbent LEC to provide access to wiring it does not control inside buildings. Given that ALTS does not cite specific instances where Bell Atlantic has denied access to any conduits or rights-of-way that it does own or control within multiple tenant environments, we do not find sufficient evidence in the record to refute Bell Atlantic's assertion.

267. RCN raises concerns regarding access to conduits and ducts provided by Bell Atlantic's wholly owned subsidiary Empire City Subway.[872] RCN does not argue, however, that Empire City Subway is not providing competitive LECs with equivalent access to conduits, but instead argues that any delay in accessing conduits is more detrimental to competitors than to Bell

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867 *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992). The 1996 Act extended the Commission's authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104; 47 U.S.C. § 224(c)(1).

868 Bell Atlantic Application at 26-27; Bell Atlantic Lacouture/Troy Decl. at paras. 128-139.

869 New York Commission Comments at 70-75. *See also* Intermedia Comments at 6 (stating that in Intermedia's experience, Bell Atlantic has complied with the requirements of this checklist item).

870 ALTS Comments at 48-49. RCN raises similar issues regarding house and riser cables under checklist items 2 and 4. RCN Comments at 3-5.

871 Bell Atlantic Lacouture/Troy Reply Decl. at para.144.

872 Letter from Patrick J. Donovan, Swidler Berlin Shereff Friedman, LLP, Counsel for RCN, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (Filed November 3, 1999) (*RCN Ex Parte* Letter). RCN claims that access to conduits and ducts requires 90 to 120 days and these delays are especially burdensome to competitive LECs with more limited infrastructure than Bell Atlantic. *See also* RCN Reply at 4-5.

Atlantic. Because RCN does not assert that Bell Atlantic is providing access to conduits in a discriminatory manner, we have no basis for finding noncompliance with this checklist item. We note that no other commenter challenges Bell Atlantic's compliance with this checklist item.

D. Checklist Item 4—Unbundled Local Loops

1. Background

268. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that Bell Atlantic provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[873] The Commission has defined the loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises."[874] This definition includes different types of loops, including "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals."[875]

269. In order to establish that it is "providing" unbundled local loops in compliance with section 271(c)(2)(B)(iv), Bell Atlantic must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality.[876] Bell Atlantic must also demonstrate that it provides nondiscriminatory access to unbundled loops.[877] In previous section 271 orders, the Commission has generally indicated that the ordering and provisioning of network elements has no retail analogue, and we therefore look to whether the BOC's performance offers an efficient competitor a meaningful opportunity to compete.[878]

270. As the Commission stated in the *Second BellSouth Louisiana Order*, one way that a BOC can demonstrate compliance with checklist item 4 is to submit performance data evidencing the time interval for providing unbundled loops and whether due dates are met.[879] As described in the discussion of checklist item 2, competing carriers must also have nondiscriminatory access to the various functions of Bell Atlantic's OSS in order to obtain unbundled loops in a timely and efficient manner.[880] Thus, we look to performance data measuring whether competing carriers are informed of the status of their order and how

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873 47 U.S.C. § 271(c)(2)(B)(iv).

874 *Local Competition First Report and Order*, 11 FCC Rcd at 15691.

875 *Id.*

876 *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637.

877 *Id.* at 20712-13.

878 *Ameritech Michigan Order*, 12 FCC Rcd at 10619.

879 *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713.

880 *Id.*; *Ameritech Michigan Order*, 12 FCC Rcd at 20614.

responsive the BOC is in providing access to necessary support functions, including maintenance and repair.

271. Bell Atlantic must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.[881] In order to provide the requested loop functionality, such as the ability to deliver ISDN or xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities, with the competing carrier bearing the cost of such conditioning. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses integrated digital loop carrier (IDLC) technology[882] or similar remote concentration devices for the particular loop sought by the competitor. Again, the costs associated with providing access to such facilities may be recovered from competing carriers.[883]

272. As part of allowing a competitor to combine its own facilities with an incumbent LEC's loops, a BOC must provide cross-connect facilities between an unbundled loop and a competing carrier's collocated equipment at prices consistent with section 252(d)(1) and on terms and conditions that are reasonable and nondiscriminatory under section 251(c)(3).[884] Incumbent LECs must also provide access to unbundled network interface devices so that requesting carriers can connect their own loop facilities at that point.[885]

2. Discussion

273. We conclude that Bell Atlantic demonstrates that it provides unbundled local loops in accordance with the requirements of section 271. As detailed below, Bell Atlantic demonstrates that it has a concrete and specific legal obligation to provide unbundled local loops to competing carriers in accordance with these requirements. In addition, Bell Atlantic provides sufficient evidence that it provides unbundled local loop transmission, for the provision of both traditional voice services and various advanced services, in a nondiscriminatory manner.

274. In reaching these conclusions, we acknowledge that we differ from the evaluation of the Department of Justice in certain material respects. Although we have accorded substantial weight to the Department's views as required by section 271, the statute prohibits us from giving

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[881] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713; *Local Competition First Report and Order*, 11 FCC Rcd at 15691.

[882] IDLC technology permits a carrier to aggregate and multiplex loop traffic at a remote concentration point and to deliver that multiplexed traffic directly into the switch without first demultiplexing the individual loops. *Local Competition First Report and Order*, 11 FCC Rcd at 15692.

[883] *Local Competition First Report and Order*, 11 FCC Rcd at 15692-93.

[884] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713.

[885] *Id.* at 15693. The network interface device is a cross-connect device used to connect the loop facilities to inside wiring. *See id.*

the Department's views preclusive weight.[886] With respect to Bell Atlantic's provision of unbundled loops, we reach conclusions that vary from those of the Department in instances where we assess the totality of the evidence differently or where we take an analytical approach distinct from that taken by the Department.

275. Bell Atlantic makes local loop transmission available on an unbundled basis in compliance with the 1996 Act through its NYPSC No. 916 Tariff and through various interconnection agreements.[887] Specifically, Bell Atlantic provisions a full range of unbundled loops, including analog and digital 2-wire and 4-wire loops, that competing carriers can use to offer a full range of services such as ISDN, ADSL, HDSL, 1.544 Mbps digital (DS1) transmission, and 45 Mbps digital (DS3) transmission.[888] Bell Atlantic provides access to stand-alone loops through cross-connects that run from the Bell Atlantic distribution frame to competing carriers' collocation space.[889]

276. Bell Atlantic provisions these unbundled local loops to competing carriers in three distinct forms. First, when Bell Atlantic does not presently serve the customer on the lines in question, a competing carrier may obtain a "new" loop from Bell Atlantic. In this case, the customer would be provided service on the second line from a competitive carrier and not from Bell Atlantic, while retaining Bell Atlantic as the provider on the original line. Second, Bell Atlantic also provisions stand-alone loops to competing carriers through coordinated conversions of active loops to the carriers' collocation space. These coordinated loop cutovers, or "hot cuts," make it possible to transfer an active Bell Atlantic customer's service to a competing carrier. For both new loops and conversions of existing customers, when loops are provisioned on a stand-alone basis, the competing carrier obtains only the transmission facility between Bell Atlantic's central office and the customer's premises. Third, Bell Atlantic provisions loops as part of a platform of network elements. When Bell Atlantic provisions a loop as part of a platform, the competitor receives the local loop, shared transport, and switching capability.[890]

277. Through September 1999, Bell Atlantic has provisioned to competing carriers 200,000 loops, including approximately 50,000 stand-alone loops and 150,000 loops provided as part of platforms of network elements.[891] Nearly 150,000 of these loops, including approximately 15,000 stand-alone loops and 130,000 platform loops, were delivered to competing carriers during the period from May through September, 1999.[892] Bell Atlantic represents that it can easily meet the current commercial demand for unbundled local loops and that it will, as needed, add

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886 *See supra* Section II.A.

887 *See* Bell Atlantic Lacouture/Troy Decl. at para. 64.

888 *Id.*

889 *Id.*

890 *See id.* at para. 66.

891 *See id.* at para. 66; Bell Atlantic Lacouture/Troy Reply Decl. at para. 34.

892 Bell Atlantic Lacouture/Troy Decl. at para. 66; Bell Atlantic Lacouture/Troy Repy Decl. at para. 34.

personnel and resources to meet any further increases in commercial demand.[893] Additionally, through September 1999, Bell Atlantic has provisioned to competing carriers more than 3,300 premium digital loops,[894] which may be appropriate for the provision of advanced services, and approximately 1,100 xDSL-specific loops,[895] which are specifically designed for the provision of advanced services.

278. To demonstrate that it provides unbundled loops in compliance with its checklist obligations, Bell Atlantic submitted performance data for various metrics relating to loop provisioning, including data on the length of provisioning intervals, missed appointment rates, "on-time" hot cut performance, and new loop and hot cut installation troubles. In addition, Bell Atlantic submitted performance data addressing both voice-grade loops and loops capable of transmitting the digital signals necessary to support high-speed data services. In view of the variety of these measures, we conclude that our analysis of this checklist item cannot focus on Bell Atlantic's performance with respect to any single metric or any single type of loop. Rather, we examine the performance data for all of the various loop metrics, as well as the factors surrounding those metrics, in order to obtain a comprehensive picture of whether Bell Atlantic is providing unbundled local loops in accordance with the requirements of checklist item 4.

279. As noted above, in the past we have evaluated whether a BOC is meeting its nondiscrimination obligation with respect to loops by examining whether loops are provided in a fashion that provides an efficient competitor a meaningful opportunity to compete.[896] In this application, however, we note that the New York Commission adopted a retail analogue for new unbundled loops, and Bell Atlantic submitted accompanying data with which we can conduct a direct parity comparison.[897] Because this retail analogue was developed as a result of the rigorous collaborative process described above, we find this means of comparison to be reasonable in this instance. We therefore conclude that Bell Atlantic must satisfy its duty of nondiscrimination by demonstrating that it provisions new unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customers.[898] Because the New York Commission did not identify a retail analogue to the coordinated cutover of an active loop, *i.e.*, a "hot cut," however, we will examine Bell Atlantic's provision of hot cuts in terms of whether its performance affords competitors a meaningful opportunity to compete.[899] We also discuss

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893 Bell Atlantic Lacouture/Troy Decl. at para. 67.

894 *Id.* at para. 78; Bell Atlantic Lacouture/Troy Reply Decl. at para. 73.

895 Bell Atlantic Lacouture/Troy Decl. at para. 81 & Attach. K; Bell Atlantic Lacouture/Troy Reply Decl. at para. 73.

896 *Ameritech Michigan Order*, 12 FCC Rcd at 20619.

897 In particular, Bell Atlantic provides data regarding its performance in provisioning second lines and other new loops to its retail customers to its retail customers.

898 *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655; *Local Competition First Report and Order*, 11 FCC Rcd at 15763-64.

899 *Ameritech Michigan Order*, 12 FCC Rcd at 20619.

separately Bell Atlantic's evidence regarding its performance with respect to xDSL loops, describing how we will consider such evidence in evaluating future applications filed under section 271.

a. Provisioning of Unbundled Local Loops

280. We conclude that Bell Atlantic presented sufficient evidence to demonstrate that it provisions loops in the quantities that competitors reasonably demand, at an acceptable level of quality, and within a reasonable timeframe. With respect to unbundled loops provisioned both on a stand-alone basis and as part of a network platform, we find that Bell Atlantic demonstrates that it provides new unbundled local loops to competing carriers in substantially the same time and manner as it provides new loops to its retail customers.

281. *Stand-Alone Loops.* We find that Bell Atlantic demonstrates that it provides new stand-alone loops to competing carriers in a nondiscriminatory manner. Specifically, as discussed below, we conclude that Bell Atlantic's processes for offering and meeting confirmed appointment dates for installing new loops to competing carriers are substantially the same as the processes for offering and meeting Bell Atlantic retail appointments. Additionally, we find that the new, stand-alone loops Bell Atlantic provisions to competing carriers are of the same quality as the loops it provides to its retail customers.

282. First, we conclude that Bell Atlantic's systems afford competing carriers access to appointment dates that is equivalent to the access provided to Bell Atlantic representatives serving retail customers. Orders for new loops are referred to as "dispatch" orders because they require that a technician be dispatched to the customer's premises in order to complete the installation.[900] With respect to these orders, competing carriers have access to the same "SMARTS" clock, which sets available dispatch loop appointments through an automated system, as do Bell Atlantic retail representatives.[901] Accordingly, competing carriers and Bell Atlantic customer representatives have equivalent access to loop installation appointments.

283. We similarly conclude that Bell Atlantic's process for meeting confirmed appointment dates is nondiscriminatory. Specifically, we find that Bell Atlantic meets the confirmed due dates of the customers of competitive carriers in the same time and manner as it meets the confirmed due dates of its retail customers. Performance data indicate that Bell Atlantic is completing loop installations within the interval requested by competitors.[902] Indeed, the Carrier-to-Carrier performance measures evidence consistently lower missed appointment rates for the customers of competing carriers than for Bell Atlantic customers. In June 1999, Bell Atlantic missed approximately 2 percent of new loop installation appointments for competing

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900 Bell Atlantic Dowell/Canny Decl. at para. 59.

901 *Id.* at para. 63; *see supra* Section V.B.1.g.

902 Bell Atlantic Lacouture/Troy Decl. at para. 76.

carriers and 9 percent of appointments for Bell Atlantic retail customers.[903] In addition, for the period from July through September 1999, Bell Atlantic missed less than one percent of installation appointments for new loops provisioned to competing carriers.[904] By contrast, during the same period, Bell Atlantic missed between 10 and 15 percent of new loop installation appointments for its retail customers.[905] As these performance data demonstrate, Bell Atlantic provisions new loops to competing carriers on a more reliable basis than it does for its own customers. We find that this level of performance demonstrates that Bell Atlantic is provisioning new loops to competitors on a timely basis in accordance with the requirements of checklist item 4.

284. In addition, we conclude that Bell Atlantic is provisioning unbundled loops, both on a stand-alone basis and as part of a platform of network elements, to competing carriers at an acceptable level of quality.[906] Bell Atlantic's performance data indicate that from June through September 1999, less than 2 percent of the new loops provisioned to competing carriers were the subject of a trouble report within 7 days of installation, whereas approximately 3 percent of Bell Atlantic retail customers reported loop troubles within the same period.[907] Similarly, from June through September, competing carriers reported far less loop troubles within 30 days of

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[903] In June, Bell Atlantic missed 1.96 percent of installation appointments for competing carriers and 9.02 percent of appointments for Bell Atlantic customers. Bell Atlantic Dowell/Canny Decl. Attach. D at 90 (metric PR-4-04 – Loop New for June 1999).

[904] In July, Bell Atlantic missed .33 percent of dispatched new loop installations for competing carriers and in August, .12 percent. Bell Atlantic Dowell/Canny Decl. Attach., D at 92, 104 (metric PR-4-04 – Loop New for July and August 1999). Similarly, Bell Atlantic missed .41 percent of loop installation appointments for competing carriers in September. Bell Atlantic Dowell/Canny Reply Decl. Attach. C at 9 (metric PR-4-04 – Loop New for September 1999).

[905] Bell Atlantic missed 10.69 percent of retail loop installation appointments in July and 9.41 percent of appointments in August. Bell Atlantic Dowell/Canny Decl. Attach. D at 92, 104 (metric PR-4-04 – Loop New for July and August 1999). Finally, Bell Atlantic missed 12.14 percent of retail loop installation appointments in September. Bell Atlantic Dowell/Canny Reply Decl. Attach. C at 9 (metric PR-4-04 – Loop New for September 1999).

[906] Installation quality performance data measure both new, stand-alone loops and loops provisioned as part of a platform. Accordingly, the only types of loops provisioned by Bell Atlantic that are not included in these reports are those provisioned as hot cuts. *See* Bell Atlantic Dowell/Canny Reply Decl. Attach. B at 47.

[907] In June, competing carriers reported troubles within 7 days for 1.28 percent of the loops installed by Bell Atlantic, and retail customers reported troubles with 2.85 percent of installed loops. Bell Atlantic Dowell/Canny Decl. Attach. D at 80 (metric PR-6-02 – Loop for June 1999). July data indicate that 1.65 percent of loops installed for competing carriers received trouble reports, and 2.90 percent of Bell Atlantic retail loops had reported troubles. *Id.* at 92 (metric PR-6-02 – Loop for July 1999). In August, competing carriers reported troubles within 7 days for 1.57 percent of the loops installed by Bell Atlantic, and retail customers reported troubles with 2.92 percent of installed loops. *Id.* at 104 (metric PR-6-02 – Loop for August 1999). In September, 1.06 percent of loops provisioned to competitors had troubles reported within 7 days of installation, while 3.15 percent of Bell Atlantic retail customers reported loop troubles within 7 days. Bell Atlantic Dowell/Canny Reply Decl. Attach. C at 9 (metric PR-6-02 – Loop for September 1999).

installation than did Bell Atlantic retail customers.[908] We find this to be substantial evidence that Bell Atlantic is provisioning new loops to competing carriers that are equivalent in quality to those it provisions to its retail customers. Furthermore, the record lacks evidence of conflicting data, nor do competing carriers raise serious disputes regarding the quality of the new voice-grade loops provisioned by Bell Atlantic.[909]

285. In concluding that Bell Atlantic provides nondiscriminatory access to new unbundled loops, we note that, although data related to average installation intervals remain important in our framework for evaluating section 271 applications, in this instance Bell Atlantic provided information that convinces us that other factors more accurately reflect its compliance with this checklist item. Accordingly, under these facts, we accord little weight to data evidencing the average intervals in which loop installations are completed.[910] The record contains performance data evidencing that, on average, competing carriers experience longer average loop installation intervals than do Bell Atlantic retail customers.[911] These differences are statistically

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[908] In June, competing carriers reported troubles within 30 days for 3.31 percent of the loops installed by Bell Atlantic, and retail customers reported troubles with 4.85 percent of installed loops. Bell Atlantic Dowell/Canny Decl. Attach. D at 80 (metric PR-6-01 – Loop for June 1999). July data indicate that 4.05 percent of loops installed for competing carriers received trouble reports within 30 days and 5.22 percent of Bell Atlantic retail loops had reported troubles. *Id.* at 92 (metric PR-6-01 – Loop for July 1999). In August, competing carriers reported troubles within 30 days for 3.50 percent of the loops installed by Bell Atlantic, and retail customers reported troubles with 5.02 percent of installed loops. *Id.* at 104 (metric PR-6-01 – Loop for August 1999). In September, 2.65 percent of loops provisioned to competitors had troubles reported within 30 days of installation, while 5.74 percent of Bell Atlantic retail customers reported loop troubles within 30 days. Bell Atlantic Dowell/Canny Reply Decl. Attach. C at 9 (metric PR-6-01 – Loop for September 1999).

[909] We note that Prism alleges that Bell Atlantic often fails to provision functioning unbundled loops. Prism Comments at 9-11. Although we have considered these claims, Prism has not asserted that any installation problems it has experienced are not reflected or captured in the relevant performance measures. Moreover, we find Prism's general allegations to be insufficient to overcome the substantial evidence in the record of the quality of new, unbundled loops provisioned by Bell Atlantic.

As discussed in our analysis of checklist item 2, we also rely heavily upon KPMG's comprehensive evaluation of Bell Atlantic's provisioning systems for both wholesale and resale services. KPMG examined the degree to which Bell Atlantic's provisioning environment for wholesale orders is "on parity" with provisioning for Bell Atlantic retail customers and concluded that Bell Atlantic had satisfied each of its testing criteria. *See generally* KPMG Final Report at POP11 IV-258-84 (Provisioning Parity Process Evaluation). *See also supra* Section V.B.1.g.

[910] Bell Atlantic's data measure the "average completed interval," which is the average number of business days between the order application date and the work completion date. Bell Atlantic Dowell/Canny Decl. Attach. B at 35. For purposes of this discussion, we use the terms "average completed interval" and "average installation interval" interchangeably.

[911] With respect to customers of competing carriers, the average competed interval in June 1999 for loops with one to five lines was 6.55 days, while the average completion interval for Bell Atlantic retail customers was 3.27 days. Bell Atlantic Dowell/Canny Decl. Attach. D at 80 (metric PR-2-03 – Loop for June 1999). In July 1999, the average installation interval for loop orders of one to five lines was 5.39 days for competing carriers and 3.08 days for Bell Atlantic customers. *Id.* at 92 (metric PR-2-03 – Loop for July 1999). In September 1999, the average installation interval for customers of competing carriers for loop orders of one to five lines was 5.88 days, and the Bell Atlantic retail average interval was 3.52 days. Bell Atlantic Dowell/Canny Reply Decl. Attach. C at 9 (metric PR-2-03 – Loop for September 1999). The data further reveal similar trends for loop orders involving more than

significant under the framework adopted by the New York Commission. As detailed below, however, we conclude that Bell Atlantic presented sufficient evidence to demonstrate that the disparity between wholesale and retail average installation intervals is not the result of discriminatory conduct, but rather is the result of factors outside of its control.

286. First, we find that Bell Atlantic demonstrates that competitive carriers frequently request later due dates than those offered by Bell Atlantic's automatic appointment clock. If competing carriers request later due dates for loop installations more often than Bell Atlantic customers, then installation intervals for those competing carriers will be, on average, longer than those for Bell Atlantic customers. Although Bell Atlantic relies upon competing carriers to specifically "code" orders that include requests for longer-than-average provisioning intervals so they can be excluded from the installation interval measures,[912] a statistical study submitted by Bell Atlantic establishes that competing carriers "miscode" a significant percentage of non-dispatch orders, causing those requests to be erroneously included in the performance data.[913] Although the statistical analysis does not address dispatched orders, such as orders for new unbundled loops, we agree with Bell Atlantic that it is likely that competing carriers similarly miscode dispatched orders for which an appointment date after the first available date is sought,[914] which would result in longer requested and actual provisioning intervals. Indeed, AT&T states that it typically requests 5 days for non-dispatch orders with standard intervals of 2 days,[915] and we find it likely that it similarly requests longer intervals for dispatch orders. Additionally, with the exception of AT&T, commenters have not taken serious issue with Bell Atlantic's provisioning of new, stand-alone unbundled loops.[916]

287. We are also persuaded by Bell Atlantic's argument that competing carriers experience longer completion intervals than its retail customers because the automatic appointment clock used to schedule available appointments contains longer average appointment intervals in some geographic areas than in others. As a result, reported average installation intervals will vary depending upon where competitive carriers are ordering service.[917] Average

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five lines, although the number of such loops ordered by competitors has consistently been very small. *See id.* (metric PR-2-04 and 2-05 – Loop for June, July, August, and September 1999).

912 Bell Atlantic Dowell/Canny Decl. Attach. B at 39.

913 *See* Bell Atlantic Application at 17; Bell Atlantic Bamberger/Gertner Decl.

914 *See* Bell Atlantic Bamberger/Gertner Decl. at para. 12.

915 AT&T Pfau/Kalb Aff. at para. 143. We note, however, that AT&T states that it does so because it lacks confidence in Bell Atlantic's ability to complete orders on-time. *Id.*

916 We note that Prism alleges a low rate of successful loop installations performed by Bell Atlantic, although it does not dispute directly Bell Atlantic's data. *See* Prism Comments at 10-11. Although we take seriously Prism's claims, we nonetheless find them to be insufficient to overcome the record evidence that Bell Atlantic provisions quality unbundled loops in a nondiscriminatory manner. In addition, although it mentions the disparity between Bell Atlantic's loop provisioning intervals, the Department of Justice does not address the provisioning of new unbundled loops in its evaluation. *See* Department of Justice Evaluation at 19 n.42.

917 Bell Atlantic Dowell/Canny Reply Decl. at para. 53.